

Editorial

Third Party Information and the Official Information Act

From time to time public sector departments and agencies receive requests for official information which has been provided to them by third parties. This 'third party information' can range from submissions or opinions of private citizens and special interest groups to commercial information provided by entities engaged in business with government agencies.

Where requests for such information are received, there will often be a need for consultation with the third party to which the information relates to ascertain whether there are any valid concerns about release of the information under the Act.

On occasion, a third party may believe there is good reason for refusal but the department or agency does not. This scenario arose in a recent case. The third party was advised by the department concerned that, notwithstanding the third party's concerns, it proposed to release certain information. The third party asked for an order that the department not release the information. After consideration by the relevant Ombudsman, the third party was advised that:

- ❖ in the first instance, it is for the department or agency to assess whether there is good reason for withholding. An Ombudsman has no power to direct a department or organisation as to how it should respond to a request for official information;
- ❖ where third parties are consulted as to whether they believe release of certain information would prejudice interests protected under the Official Information Act, the third parties can reasonably expect their concerns to be taken into account but they cannot veto release of the information; and

- ❖ if the department or agency believes, in good faith, that after considering the circumstances of the particular request there is no good reason for refusal under the Act, then it is not open to the department or agency to refuse the request simply because the third party does not consent to disclosure. Lack of such consent is not, in itself, a reason for refusal.

The fundamental questions to be asked in assessing whether there is good reason for refusing a particular request are:

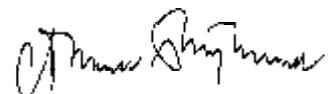
- * what is the harm that would result if the information were released in response to a request, and
- * does that predicted harm relate to an interest which is protected by one of the specific withholding provisions set out in the Act?

If a third party believes disclosure of certain information would harm it in some way, it needs to explain to the department or organisation what exactly that harm would be and how it would arise.

Should the department or agency make the information available, it may be open for a third party, which believes it has been adversely affected by such disclosure, to ask an Ombudsman to investigate under the Ombudsmen Act whether, in all the circumstances, the decision to release the information was reasonable.



Sir Brian Elwood
Chief Ombudsman



Anand Satyanand
Ombudsman

Reasonable Assistance

The requirement upon requesters under s12(2) of the Official Information Act that “*the official information requested shall be specified with due particularity in the request*” is balanced by an equal duty under s13 upon every Department, Minister of the Crown and organisation to give “*reasonable assistance*.”

Fulfilling the requirement under s13 may enable a requester to make a request in a manner that is in accordance with s12.

Reasonable assistance requires more than simply stating that the request is not specific enough. In many cases, requesters may not have sufficient knowledge of the precise nature of the information they are seeking to allow them to be more specific.

The best method for providing assistance may be for the agency receiving the request to communicate with the requester to see if clarification can be provided so the request can be focussed more narrowly to capture the essential information required.

The Police Association had made two separate but connected requests to the Police – one in a five-month timeframe and one in an eight-year timeframe - for information on pay negotiations, bargaining strategy, remuneration structures, employment conditions and proposed offers or settlements for both sworn and non-sworn Police staff. Initially, all the information requested was withheld.

The Police declined the first request under s9(2)(j) of the OIA, to avoid prejudice or disadvantage to future industrial negotiations. The Ombudsman formed the view that some parts of the information should properly be withheld but that the remaining parts should be released, and that the Police should release brief summaries of those parts for which there was good reason to withhold.

They declined the second request under s18(f) because the information could not be made available without substantial collation and research. During the course of the Ombudsman’s investigation, the Police Association said it was willing to focus its second request if the Police were willing to enter a dialogue with them on this. The Police agreed, so investigation of the complaint under s18(j) was discontinued.

Practice Guidelines

The Practice Guidelines of the Office of the Ombudsmen are now available on the internet – www.ombudsmen.govt.nz – and copies can be downloaded free of charge. They provide guidance for departments and organisations subject to the Ombudsmen’s jurisdiction as well as guidance on the Ombudsmen’s approach to particular aspects of the official information legislation, and are updated regularly.

IOI President

The Chief Ombudsman, Sir Brian Elwood, was re-elected as President of the International Ombudsman Institute at its conference in Durban, South Africa. The Institute consists of the Ombudsmen from 107 countries and is based at the University of Alberta Law School in Edmonton, Alberta, Canada.

Case Notes

The Case Notes of the Ombudsmen provide examples of the Ombudsmen’s jurisprudence and a limited supply of the 12th Compendium, covering the period from January 1998 to December 1999, remains. Copies may be purchased from the Wellington office at a cost of NZ\$25.00. Please enclose payment with your order.

Departmental guides to customers

A guide prepared by a Government Department to assist its customers needs to be accurate. If it is incomplete or misleading then the customer who has relied upon it may have a valid cause for complaint and compensation may be required of the Department.

Provisional tax had been paid by both a company and its directors. They had relied upon information in the Inland Revenue Department's 1997 "*Company Tax Guide*" using the "*standard formula*" method rather than the "*estimate*" method to calculate provisional tax.

This had resulted in what all parties had agreed were large overpayments at the end of the tax year.

In spite of the company and directors having relied on the misleading IRD tax guide, the IRD said they were not eligible to receive "*use of money interest*" (UOMI) from the IRD because they had used the "*standard formula*" rather than the "*estimate*" method for calculating their tax.

Complaints were referred to the Ombudsman by both aggrieved parties. He upheld the complaint of the company but not of the directors. The tax guide treated individuals and companies differently.

It was suggested in the tax guide that individuals who were unclear where they stood as to the UOMI should clarify their doubts with an IRD office, which the directors had not done. There was no such suggestion in the section relevant to companies, so the company had good reason to expect to receive the UOMI in the event of overpayment of its provisional tax.

The Ombudsman considered it would not in these circumstances be unreasonable for the IRD to compensate the company for the loss it had sustained by relying on incomplete or misleading information published by the IRD, which agreed to make an *ex gratia* payment to the company.

CORRECTING A MISTAKE

If a government agency refuses a request for official information and subsequently realises it was wrong to do so, it can correct this mistake itself at any time. There will then be no need to persist with any review process that has been initiated.

An example of this occurred recently when a partner in a law firm had had a request, on behalf of a client, for official information contained in a Cabinet paper declined by the Ministry of Economic Development.

The Ministry had referred the request to its own Minister. He in turn referred it to the Department of the Prime Minister and Cabinet, which recommended declining the request on the grounds that it is standard procedure to retain such material

when introduction of a related Supplementary Order Paper into Parliament is pending.

When the Ministry learned the solicitor had referred the matter to the Ombudsman, it reviewed its decision. To be withheld under the Official Information Act (OIA), the relevant official information needs to be likely to result in prejudice or harm of a kind which the OIA is intended to protect.

The Ministry found that "*clearly the decision to withhold the Cabinet paper at issue was wrong under the OIA and it should have been released.*" Subsequent to its own review, the Ministry released the Cabinet paper and the Ombudsman took no action.



Public Disclosure of Salary Band

The need to withhold information requested about the salary band and benefits paid to senior public servants, which might infringe their privacy, may be outweighed by considerations favouring disclosure.

In reviewing a complaint about failure to disclose details involving a senior official, the view was formed that the public interest would be served in providing –

- (i) the band in which the official's salary fell;
- (ii) that there was an allowance paid for use of a car for business purposes;
- (iii) professional membership and other fees; and
- (iv) rental and other costs associated with electronic communication facilities.

Strong public interest would outweigh any infringement of the official's privacy.

It had emerged during the investigation that the State Services Commission had no objections, in general, to the disclosure of the salary band and benefits the official was receiving.

The official's employer, however, objected that the release of information as proposed would represent *“a significant further intrusion into the privacy of ... beyond the principles which have been established and accepted within the public service to date.”*

A new precedent was not being established. Earlier Ombudsman investigations had supported the release of details of the employment terms and conditions of chief executives in the public service or State-owned enterprises.

A decision by an Ombudsman does not set a precedent. Each case is assessed on its merits. While it is unlikely that Ombudsmen would form different opinions in cases where the salient facts are the same, each case is considered having regard to the particular facts and circumstances. In this case, the relevant Ombudsman could see no good reason to change the earlier approach to the release of employment terms and conditions.

TALKING TO THE WRONG PERSON OR PAST THE RIGHT ONE

Often, people complaining to and about the public service may talk to the wrong people or become offside at the start and so talk to the correct person, but past them.

In these circumstances, before investigating such a complaint, it is sometimes preferable for an Ombudsman first to encourage the parties involved to actually talk to each other.

In a recent complaint, a professional truck driver had been convicted of careless use, been fined and disqualified from driving for three months. He said he had been told this suspension was effective from the date he paid his fine and began three months of unpaid leave from his job.

Two months later he was served with his suspension notice and told that his suspension was effective from that date. He approached the Land

Transport Safety Authority because he was facing an extra two months without income for circumstances he believed was not his fault.

Under the legislation, suspension is effective from the date of serving the notice and not when the fine is paid, although the LTSA has delegated authority to exercise some discretion in such cases. In this case it declined to exercise it because it was said the licence-server had been unable to contact the complainant. The driver then approached the Ombudsman.

The Ombudsman was able to organise direct contact between the truck driver and the LTSA manager in whom the discretion was vested. Once this had occurred, his suspension was back-dated and the case closed without the months of work by all parties which would otherwise have been required, with no guarantee of satisfaction for anyone at the end.

